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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-286

THEODORE O. BATES, *Petitioner,*

v.

PRUDENTIAL-GRACE LINES, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

PRUDENTIAL-GRACE LINES, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Theodore O. Bates, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled action on May 17, 1974, insofar as that judgment sustained the trial court on petitioner's appeal.

I.

REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 497 F.2d 900 (9th Cir. 1974); the opinion of the United States District

Court for the Western District of Washington is reported at 375 F.Supp. 774 (W.D. Wash. 1972). The opinions are reproduced in the appendix hereto.

II.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 17, 1974. A petition for rehearing was denied by order filed June 17, 1974. Jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254.

III.

QUESTIONS PRESENTED

A.

Is a seaman, leaving the ship on shore leave, precluded as a matter of law from recovering damages under the Jones Act for injuries sustained on a dock not owned or legally "controlled" by the shipowner?

B.

Is a seaman, under the Jones Act, afforded equal rights of recovery to those granted to a railroad worker under the FELA; or is the FELA, when applied to seamen, constricted by traditional concepts of maritime or common law?

C.

Is the right to jury trial wrongfully deprived by a judgment n.o.v. based upon a conclusion that a shipowner's duty ends at the gangway?

IV.

STATUTES INVOLVED

This petition involves the interpretation of § 1 of the Federal Employers' Liability Act, 45 U.S.C. § 51, as incorporated by the Jones Act, 46 U.S.C. § 688. 45 U.S.C. § 51 is as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee: and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

46 U.S.C. § 688 is as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1929, c. 250, § 33, 41 Stat. 1007."

V.

STATEMENT OF THE CASE

This is an action by a seaman employee against his employer under the Jones Act, 46 U.S.C. § 688.

Petitioner was employed by the defendant as deck department seaman on respondent's merchant vessel SS SANTA REGINA. On the voyage in question, the vessel sailed southward from San Francisco to Pacific coast ports of South America, around Cape Horn, northward to Brazil, and then homeward, calling again at essentially the same ports (Tr. 67, 68; R. 148). It called at the Port of Antofagasta, Chile, and worked cargo on both the outward and homeward-bound portions of the voyage (Tr. 68). Petitioner was injured during the second visit.

Respondent arranged for loading or discharging of cargo at various ports through its San Francisco, California, offices (Tr. 79). Under its procedure, respondent would contact its agent in Antofagasta, Chile, who arranged the berthing for the vessel and for loading or discharging the cargo. The agent in Antofagasta also was to supply other needs of the vessel during its stay, arising in the vessel's normal course of operations (Tr. 8, 79). Respondent paid a wharfage fee for the use of the pier arranged through its agent (R. 148).

The pier was used by certain of the crew members to perform tasks required during loading (Tr. 89), and also was used by all of the crew for ingress and egress. They were required to pass through the main gate at the shoreward end of the pier (Tr. 75). The evidence also showed that the agent performed multiple duties for the respondent which required his or his employees' presence and involved coming to the vessel two or three times per day (Tr. 80).

Captain Thomas A. Clark, an expert witness, testified that a wharfage fee is paid for the purpose of obtaining use of the pier for several needs of a vessel, including use for ingress and egress (Tr. 119), and that it is the shipowner's duty to arrange for transportation for crew members to shore, either by water transportation if the vessel is moored away from shore, or by use of a pier (Tr. 118). He also testified as to duties of a ship's officers with regard to pier hazards (Tr. 127-128).

On August 5, 1970, the vessel arrived for its second call at Antofagasta, Chile, to load bulk ore (Tr. 76). Three days later, August 8, 1970, petitioner

was injured when he stepped in a hole on the pier to which the vessel had been moored since arrival (R. 148).

The vessel was moored portside to, bow out (Tr. 92, 78). A railroad track on the pier paralleled the vessel. The track was approximately 10 to 12 feet from the edge of the pier and extended from the vessel to the main exit gate (Tr. 14). The logical route and the one followed by the crew members leaving the vessel or returning from the main gate was along that course (Tr. 49, Ex. 11). Between the gangway and the main gate, along the route for ingress and egress, were several large holes, some three to four feet square (Tr. 19, 135-136, 138).

The master had been on the pier prior to the incident in question, and was aware that there were several holes on the dock as close as one hundred feet to the point of injury (Tr. 88). The master had provided no warnings to the crew members of the dock conditions (Tr. 89), nor had any warning by anyone been provided to petitioner (Tr. 22).

The injury occurred at approximately 4:30 p.m., shortly after petitioner had left the vessel, intending to go ashore. The Captain and the purser had left just before him, so petitioner walked up alongside them and the three continued toward the main gate, walking abreast. The Captain was to petitioner's immediate left and the purser to the left of the Captain. Petitioner was talking to the Captain and looking at him when he stepped into a hole in the pier about 18 inches in diameter (Tr. 19-21, 97). The testimony was in conflict as to whether the Captain had shouted a warning when he noticed that hole immediately before the injury (Tr. 20-21, 85-86). The

point of the injury was approximately 300 feet from the vessel's gangway and 1,000 feet short of the main gate (Tr. 88, 96).

The testimony of several witnesses was that docks with holes in them were unusual (Tr. 22, 137-138) and unsafe (Tr. 122). The evidence further showed that a master aware of dangerous conditions on a dock should take steps to remedy defects for the protection of the crew members (Tr. 120). Captain Clark stated that the master should notify the agent or dock superintendent of hazardous conditions and request safeguards (Tr. 127-128), and that it is customary that barricades or steel plates be used to protect persons from being injured in holes on piers (Tr. 124, 137).

Petitioner's claim was tried in the U. S. District Court for the Western District of Washington, Honorable William J. Lindberg presiding with a jury. The jury returned a special verdict on February 24, 1972, finding that petitioner "sustained an injury on August 8, 1970, as a direct and proximate result of negligence of the defendant or the defendant's failure to exercise reasonable care to provide a reasonably safe place to work . . . ." The jury assessed damages of $90,000.00, found the petitioner 5% contributorily negligent, and therefore rendered a net verdict of $85,500.00 (R. 161-62).

Respondent filed motions for judgment n.o.v. and new trial on March 3, 1972, but on March 16, 1972, Judge Lindberg signed a judgment on the verdict (App. 1a). Respondent filed a memorandum in support of its motion for judgment n.o.v. or new trial on March 29, 1972, to which petitioner responded on June 6, 1972 (R. 169, 203). Judge Lindberg announced by letter of June 30, 1972 (R. 212), that he would grant

judgment n.o.v., following which a judgment to that effect was entered July 14, and an amended judgment to the same effect entered August 1, 1972 (App. 2a, 3a). A memorandum opinion in support of the final judgment (App. 4a-9a) was signed by Judge Lindberg and filed on August 17, 10 days after petitioner filed his notice of appeal to the Ninth Circuit (R. 217). Respondent cross-appealed from the denial of its alternative motion for new trial (R. 219).

The Court of Appeals for the Ninth Circuit, by letter dated May 2, 1974, advised the parties that oral argument would not be held (App. 10a). On May 17, 1974, it affirmed the trial court on petitioner's appeal, dismissed the cross-appeal as moot, and filed an opinion incorporating the memorandum opinion of the District Court (App. 11a-13a). Petition for rehearing was denied July 17, 1974 (App. 13a).

This petition asks the Court to review the decisions below, to reverse them, and to reinstate the verdict.

VI.

ARGUMENT

A.

Summary of Argument

This is a seaman's case; it is also an FELA case. The courts below and others before them have allowed the former of those characterizations to obliterate the latter. They have allowed fixed, albeit sometimes erroneous, ideas as to maritime law to deny to petitioner the scope of protection against his employer's negligence provided in the Federal Employers' Liability Act, which is incorporated within the Jones Act.

Specifically, the courts below have held, following a long but unworthy line of cases, that a shipowner's liability for negligence under the Jones Act ends at the gangway, at least insofar as a seaman leaving the ship on shore leave is concerned, unless the employer owns or legally "controls" the dock.

This Court has never decided the precise question involved in this case, which is an important question in the administration of both the Jones Act and the FELA. The decisions below and the cases on which they rely are inconsistent with decisions of this Court under both the Jones Act and the FELA and directly contrary to decisions in several circuits involving injuries to railroad workers under similar circumstances.

B.

FELA Standards Govern a Seaman's Claim Based on Negligence

As will be discussed more fully in subsequent sections of this petition, one of the major errors in the decisions below and in the cases there relied upon is the failure to apply the Federal Employers' Liability Act and decisions under it to Jones Act claims.

1. *The FELA applies with full force under the Jones Act.*

The Jones Act provides in part:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; . . . ." 46 U.S.C. § 688.

The statute there referred to is of course the FELA, the most important provision of which is § 1, which provides in part that "every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . ." This Court has consistently held that not only are the FELA standards fully incorporated into the Jones Act, but that they are to be liberally construed. Mr. Justice Cardozo, speaking for the court in *Cortes* v. *Baltimore Insular Line*, 287 U.S. 367, 375 (1932), expressed the principle as follows:

> "This court has held that the act is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings . . . Approaching the decision of this case in a like spirit of liberality, we put aside many of the refinements of construction that a different spirit might approve."

The Court in *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 431 (1958), noted that:

> "Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers."

The Court, in finding that liability could be based upon violation of a statute not directly intended for the benefit of the plaintiff, further held:

> "We find no difficulty in applying these principles, developed under the FELA, to the present action under the Jones Act, for the latter act ex-

pressly provides for seamen the cause of action—and consequently the judicially developed doctrine of liability—granted to railroad workers by the FELA." 355 U.S. at 392.

2. *The employer has a non-delegable duty to provide a safe place to work.*

One of the firmly established rules in the FELA cases is that the railroad must provide to its workmen a safe place to work. The general principle is not disputed in this case. The issue is whether that duty extends to the property of third parties. It is clear that under the FELA that question has been answered in the affirmative.

In *Shenker* v. *Baltimore & Ohio RR Co.*, 374 U.S. 1, 7 (1963), the Court held that the employer was liable for injuries caused by defects in a car owned by another line. In approving an instruction setting forth a duty to inspect, the Court observed that the trial court relied on a series of opinions in the Courts of Appeals holding

> ". . . that a railroad has the nondelegable duty to provide its employees with a safe place to work even when they are required to go onto the premises of a third party over which the railroad has no control. See Kooker v. Pittsburgh & Lake Erie R. Co. (CA6 Ohio) 258 F.2d 876; Chicago Great Western R. Co. v. Casura (CA8 Minn) 234 F.2d 441; Beattie v. Elgin, J. & E. R. Co. (CA7 Ill) 217 F.2d 863. These decisions are in accord with the opinions of this Court in Bailey v. Central Vermont R. Co. 319 U.S. 350, Ellis v. Union P. R. Co. 329 U.S. 649; Harris v. Pennsylvania R. Co. 361 U.S. 15, revg. 168 Ohio St. 582, 7 Ohio Ops 2d 456, 156 NE2d 822."

There is indeed a long line of cases in the Courts of Appeals holding that the employer is liable for unsafe conditions on the property of a third party. In addition to the cases cited in the foregoing quotation, there are *Nivens* v. *St. Louis Southwestern Ry. Co.*, 425 F.2d 114 (5th Cir. 1970); *cert. denied*, 400 U.S. 879 (1970); *Atlantic Coast Line R. Co.* v. *Robertson*, 214 F.2d 746 (4th Cir. 1954); and *Terminal R. Ass'n of St. Louis* v. *Fitzjohn*, 165 F.2d 473 (8th Cir. 1948). *Payne* v. *Baltimore & Ohio R. Co.*, 309 F.2d 546, 549 (6th Cir. 1962), *cert denied*, 374 U.S. 827 (1963), expressed the rule as follows:

> "A railroad has the non-delegable duty to provide an employee with a safe place to work. This is so despite the fact that it may not own, control or be under a primary obligation to maintain the premises on which the employee is injured. A railroad is not relieved from liability because such premises are unsafe or because of the existence of an unsafe condition brought about through the act of another and without fault, on the railroad's part."

Kooker, supra, arose out of an injury sustained by a yard helper who slipped and fell on an icy path leading from a parking lot to the yard as he was reporting for work. The site of the accident was alleged to be owned by a third party. The Sixth Circuit reversed a directed defense verdict, holding that the employer's duty "may extend beyond its premises and to property which third persons have a primary duty to maintain." 258 F.2d at 878.

One of the more recent cases, and one exactly in point for the present controversy, is *Carter* v. *Union*

R. Co., 438 F.2d 208 (3d Cir. 1971). In that case the plaintiff was injured while crossing property owned by General Motors Corp. while on his way to work. The railroad exercised no control over the situs of the accident. Relying on *Bountiful Brick Co.* v. *Giles*, 276 U.S. 154 (1928), the court found that the plaintiff was within the course of his employment, and therefore the FELA applied, even though the employee was injured on the premises of a third party on his way to work. Relying upon *Shenker, supra,* and the various Court of Appeals decisions, the court found that the non-delegable duty to provide a safe place to work "includes a responsibility to inspect the third party's property and to take precautions to protect the employee . . . ." 438 F.2d at 211. Finally, the Court of Appeals held, following *Hopson* v. *Texaco, Inc.*, 383 U.S. 262 (1966), that the use of General Motors' property by employees was an operational activity of the railway and General Motors therefore was the statutory agent of the railway under § 1 of the FELA. *Carter* establishes the following fundamental rule: The employer's non-delegable duty to provide a safe place to work extends to property owned by a third party, over which the employer exercises no control, even when used by employees solely as a way to the jobsite. That case is indistinguishable from the one at bar, is supported by the decisions of this Court and of six circuits, and is a proper application of the statutory standard of liability. However, the Ninth Circuit has rejected *Carter* on the ground that it cannot apply to a seaman's case. For reasons which will be noted below, any difference in the status of seamen and railroad workers should make the *Carter* principle all the more applicable to the present case.

C.

A Seaman's Rights Do Not End at the Gangway

1. *There is no jurisdictional question.*

The case relied upon by the Ninth Circuit, *Todahl* v. *Sudden & Christenson,* 5 F.2d 462 (9th Cir. 1925), is an oddity in many respects. The courts below might have been on notice that *Todahl* was questionable authority simply because of its age.

> "The radical reconstruction of Maritime personal injury law since 1940 has made much of the older case law of little more than antiquarian interest." Gilmore & Black, The Law of Admiralty 253, fn. 12 (1957).

The result in *Todahl* was dictated by a misconception by the court of the extent of Jones Act jurisdiction.

> "We find no warrant in any provision of that act for disregarding the prior well-settled rule that admiralty has no jurisdiction over torts committed on land." 5 F.2d at 463.

If that position ever had any validity, it certainly disappeared with this Court's decision in *O'Donnell* v. *Great Lakes Dredge & Dock Co.,* 318 U.S. 36, 42-43 (1943), which held that:

> "The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters."

Nevertheless, the Ninth Circuit has persisted in its belief that the Jones Act, in and of itself, could not allow recovery for injuries sustained on land. The

opinion of the District Court in this case, adopted by the Court of Appeals, held as follows as to *Todahl:*

> "The first ground relied upon by the *Todahl* court was an expression of the old locality rule which clearly has been vitiated by the Extension of Admiralty Jurisdiction Act of 1948. This Act broadened the admiralty jurisdiction to include injuries 'caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.'" (App. 6a)

It is not surpising that the decisions below were in error as they were based upon the misconception that the Jones Act extended ashore only by virtue of the Extension Act, 46 U.S.C. § 740, which in turn limits liability to injuries "caused by a vessel."

Another panel of the Ninth Circuit has recognized the error of *Todahl.* In *Gebhard* v. *SS Hawaiian Legislator,* 425 F.2d 1303, 1308 (9th Cir. 1970), it was noted that,

> "A second category of tort claim unaffected by the locality rule was recovery under the Jones Act . . . The act granted seamen an action for injuries arising out of maritime employment and resulting from the negligence of their employer or its employees. Lower courts at first reasoned that a claim under the act, being a tort claim, was restricted by the locality rule. (e.g., *Todahl* v. *Sudden & Christenson* (9th Cir. 1925) 5 F.2d 462; see G. Robinson Handbook of Admiralty Law in the United States (1939),332-35 and cases cited therein.) But *O'Donnell, supra,* made it clear that the seamen's maritime status again created an exception to the locality rule: . . . ."

However, the panel which heard the present case and, therefore, for the purposes of this petition, the Ninth

Circuit as a whole, persists in an error which must be corrected.

2. *The employer may be liable for negligence causing an injury ashore.*

In a variety of circumstances, none quite identical to the present case, this Court has held that a seaman has a right of recovery under the Jones Act for injuries sustained ashore. *O'Donnell, supra,* established liability for an injury sustained by a seaman who had gone ashore to assist in repairing equipment used in unloading. The Court noted that it had never been questioned that the seaman's right to maintenance and cure under general maritime law extended to injuries sustained ashore, and that the Jones Act was a supplement thereto. *Senko* v. *LaCrosse Dredging Corp.*, 352 U.S. 370 (1957), held that the plaintiff could recover for injuries sustained when a coal stove in a shed on the bank exploded. "The fact that petitioner's injury occurred on land is not material." 352 U.S. at 373.

The territorial sweep of the Jones Act is not limited even to the areas immediately adjacent to the shore. In *Hopson* v. *Texaco, Inc.*, 383 U.S. 262 (1966), the Court held in a *per curiam* decision that actions for injury and death would lie under the Jones Act even though the incident involved was an automobile accident. The two seamen in question were members of the crew of a tanker which had docked in Trinidad. As both were ill and could not continue the voyage, they were sent, as required by law, to the United States Consul for transportation home. The ship engaged the services of a taxi to transport them and, on route, the accident occurred. The Court noted the applicability of the FELA and its holding in *Sinkler* v.

Missouri Pacific R. Co., 356 U.S. 326 (1958), that when an "employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of § 1 of the FELA." 383 U.S. at 264. The Court found that under the circumstances the taxi driver was the employer's statutory agent.

Hopson has been followed by at least two of the Courts of Appeals in cases indicating that its rule is not limited to cases of special statutory duty such as existed in *Hopson*. In *Magnolia Towing Co.* v. *Pace*, 378 F.2d 12 (5th Cir. 1967), the plaintiff was a tug pilot who worked three days on shift and two off. He was called on his day off and ordered to the boat. He traveled part of the distance from his home to the boat by bus, then was met by another employee who drove him the remainder of the distance in the fellow employee's car. Plaintiff was injured in an accident during the last leg of that journey. The Fifth Circuit found that the Jones Act applied and that the place of the injury was not controlling.

Even the Ninth Circuit has followed suit. In *Williamson* v. *Western Pacific Dredging Corp.*, 441 F.2d 65 (9th Cir. 1971), *cert. denied*, 404 U.S. 851 (1971), the court affirmed a judgment awarding maintenance and cure and Jones Act damages for death arising out of injuries to a seaman employed aboard the defendant's dredge who commuted to and from his home daily and was killed in an automobile accident in which the driver, a fellow employee, was found to be at fault. Again, a different panel of the Ninth Circuit was involved than in the present case. That panel found no difficulty in following *Hopson* and in dis-

posing of the defendant's argument that it had no control over the situation by quoting this Court's statement in *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 480 (1947):

> "The presence or absence of control is certainly a factor to be considered. But it is not decisive." 441 F.2d at 66.

3. *Shore leave is part of a seaman's employment.*

The Ninth Circuit has refused to apply the Jones Act to injuries sustained on the dock while going on or returning from shore leave, even though it has applied the Act to an injury occurring during recreation on deck. *Sundberg* v. *Washington Fish & Oyster Co.*, 138 F.2d 801 (9th Cir. 1943). The distinction cannot be justified.

In *Aguilar* v. *Standard Oil Co. of New Jersey*, 318 U.S. 724, 725 (1943), the question presented was, "whether a ship owner is liable for wages and maintenance and cure to a seaman who, having left his vessel on authorized shore leave, is injured while traversing the only available route between the moored ship and a public street." The question was answered in the affirmative.

> "We think that the principles governing shipboard injuries apply to the facts presented by these cases. To relieve the shipowner of his obligation in the case of injuries incurred on shore leave would cast upon the seaman hazards encountered only by reason of the voyage. The assumption is hardly sound that the normal uses and purposes of shore leave are 'exclusively personal' and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship without substantial impairment of their efficiency,

> if not also serious danger to discipline. . . . In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion." 318 U.S. at 733.

Except that this case involves a Jones Act claim for damages, the circumstances are identical.

Less than three months before the decision in *Aguilar*, this Court had held in *O'Donnell, supra*, that the Jones Act was merely an extension of the remedy of maintenance and cure.

> "It follows that the Jones Act, in extending a right of recovery to the seaman injured while in the service of his vessel by negligence, has done no more than supplement the remedy of maintenance and cure for injuries suffered by the seaman, whether on land or sea, by giving to him the indemnity which the maritime law afforded to a seaman injured in consequence of the unseaworthiness of the vessel or its tackle. Pacific S.S. Co. v. Peterson, 278 U.S. 130, 73 L ed. 220, 49 S Ct. 75, supra." 318 U.S. at 43.

The concept of the service of the ship carries over into Jones Act cases. *Braen* v. *Pfeifer Oil Transportation Co.*, 361 U.S. 129, 132 (1959), holds that *Aguilar* and other maintenance and cure cases are relevant to the Jones Act in that,

> ". . . they make clear that the scope of a seaman's employment or the activities which are related to the furtherance of the vessel are not measured by the standards applied to land-based employment relationships. They also supply relevant guides to the meaning of the term 'course of employment' under the Act since it is the equivalent of the 'service of the ship' formula used in maintenance and cure cases."

The Act applies to injuries sustained in the course of employment, 46 U.S.C. § 688, and therefore applies to shore leave.

4. *Control of the dock by the shipowner is not necessary.*

Braen cites with approval *Marceau* v. *Great Lakes Transit Corp.*, 146 F.2d 416 (2d Cir. 1945), *cert. denied*, 324 U.S. 872 (1945). *Marceau* held that a member of the crew had a Jones Act claim for an injury sustained when he slipped on the dock near the ship while returning from shore leave. *Marceau* is indistinguishable from the present case except for the question of control. In *Marceau* it was noted that the injury occurred "on property in the possession and under the control of the defendant as lessee and over which the plaintiff had to pass in order to return to his work." 146 F.2d at 418. That observation, however, appears to relate to the question of course of employment rather than scope of duty. The court noted,

> "Under the decisions a man is acting in the course of his employment when coming to or returning from work, and upon the employer's premises or upon adjacent property if approaching by a customary route." *Ibid.*

The courts below have seized upon the question of control as establishing as a matter of law that there can be no duty on the part of the employer to provide a safe pathway. In so doing they have ignored the FELA and have substituted common law standards which do not apply and which are obsolete in any event.

The Ninth Circuit in *Todahl*, after disposing of the Jones Act, was unable to find that "as against the

owners of the steamship the complaint states a cause of action at common law." 5 F.2d at 463. Having selected the wrong standard of liability, the court proceeded to find absence of duty because plaintiff was not in the service of the ship as he was returning from shore leave and because the employer had no control over the dock. The court added a final error by holding that any common law recovery would be superseded by the California Workmen's Compensation Act.

Despite the obvious infirmities of *Todahl*, it has been followed in other circuits. In *Paul* v. *United States*, 205 F.2d 38 (3d Cir. 1953), *cert. denied*, 346 U.S. 888 (1953), the court cited *Todahl* as authority regarding the question of control of the dock. The *Paul* court then proceeded to parallel the *Todahl* error by engaging in "an exhaustive research in analogous situations in non-maritime law, . . ." 205 F.2d at 41. The court's research was misdirected, as the standard of care in Jones Act cases is higher than that demanded by the common law. *Kernan* v. *American Dredging Co.*, 355 U.S. 426 (1958).

Apart from the inapplicability of common law principles, the exhaustiveness of the research might be questioned, as most of the cases cited are rather ancient. Even under common law, the better rule now would support liability in this case.

> "The master's duty as to working conditions does not extend to the condition of premises not in his control, or to the conduct of third persons with whom the servants are to be brought into contact during the course of the work, *except that he has a duty to disclose dangerous conditions of which he should know.* * * *
>
> ". . . A master leasing a portion of a building for his business is not liable for harm caused to his

> servants by defects in other portions of the building over which his servants are required to pass, *unless he has notice that such other portions are defective.* He is subject to no duty of inspection, except upon the premises in his control, *unless he has notice that other portions may be dangerous.* 2 Restatement of Agency 2d 461-63 § 504 and comment e. (italics added)

Here, the Captain was on notice of the dangerous condition of the dock, but did nothing to warn petitioner or anyone else (Tr. 88-89).

Had this action been tried in state court in the same district under the supposedly more restrictive rules of common law negligence, plaintiff would have prevailed. In *Rockefeller* v. *Standard Oil Co. of Cal.*, 11 Wn. App. 520, 523 P.2d 1207 (1974), a judgment n.o.v. for the defendant was reversed. The plaintiffs had been injured when their truck fell into a ditch on state property adjacent to defendant's service station, as plaintiffs attempted to drive in. The Court of Appeals held as follows:

> "Standard Oil owed a duty to its business invitees of safe ingress and egress from its property. . . . Whether this duty was discharged was a proper question for the jury. To incur liability, Standard Oil need not own or control the property on which the hazard was located, nor is it required that Standard Oil create the hazard. The record contains evidence from which the jury could reasonably have concluded that the hazard created a forseeable risk of harm to Standard Oil's business invitees and that Standard Oil knew of its presence and should have taken reasonable precautions to eliminate it by, for example, posting warnings or barriers or providing adequate illumination. Nothing more was required. . . . It was error to set aside the verdict." 11 Wn. App. at 522.

Chief Judge Biggs, dissenting in *Paul*, reminded the court that,

> "Negligence within the purview of the Jones Act is to be construed liberally, bearing in mind that the obligation of the shipowner to his seamen is greater than that of the ordinary employer to his employees." 205 F.2d at 43.

If, by the modern common law rule, there would be liability, there cannot be any question under the Jones Act. Neither notice nor control are required: *Shenker* v. *Baltimore & Ohio R. Co.*, 374 U.S. 1 (1963); *Carter* v. *Union R. Co.*, 438 F.2d 208 (3d Cir. 1971).

Although never expressly overruled, *Paul* appears to have been abandoned by the Third Circuit. *Carter* repudiates the principle that control over the third party's premises is necessary to impose FELA liability. *Paul* is not discussed in *Carter*, but the two cases are irreconcilable. In addition, at least one of the District Courts in the Third Circuit has felt free to ignore *Paul* in Jones Act cases. *Hamilton* v. *Marine Carriers Corp.*, 332 F.Supp. 223 (E.D. Pa. 1971), is on all fours with the present case. Hamilton sued the ship for injuries sustained when he stepped into an ice-covered hole on the dock while returning to his ship from shore leave. The dock was owned by the Port Authority of Amsterdam and the defendant exercised no control over it. The court found that the wharfage agreement created an agency, within the operational activity rule of *Hopson*, that served to impute to the employer the negligence of the port in maintaining the pier. In addition, the court held that the employer had violated its nondelegable duty to provide a safe place to work and in so doing held that *Paul* had, in effect, been overruled by *Carter* and by this Court's decision in *Shenker*.

Another judge of the same court has upheld a Jones Act claim based upon an injury sustained by a seaman when boarding a launch which was returning him to his ship after shore leave. In so holding, the court impliedly rejected a line of cases, relied on by the District Court herein, finding no duty on the part of the ship with respect to the safety of its crew going ashore or returning in boats owned by third parties. *Novick* v. *United States*, 324 F.Supp. 1138 (E.D. Pa. 1971). *Accord*, *Massey* v. *Williams-McWilliams, Inc.*, 414 F.2d 675 (5th Cir. 1969) *cert. denied*, 396 U.S. 1037 (1970).

Todahl has received similar treatment from a District Court in its circuit. In *Weissbach* v. *Matson Navigation Co.*, 345 F.Supp. 1176 (N.D. Cal. 1972), the court found liability for failure to have a safety net under the gangway as required by statute. The defendant contended that the net was required only under the gangway itself and not under the platform upon which the gangway rested. The court rejected that argument, quoting this Court's holding in *Aguilar* that it was the shipowner's business that required the use of the dock. The court held, in direct contradiction to the *Todahl* rule.

> "It would not be possible for the employees of Matson to get on board ship without stepping onto and crossing the platform. The burden of making safe this area falls to the shipowner as it is under its temporary control, and it is using it to support its gangway." 345 F.Supp. at 1178.

However, the decision in the present case has breathed new life into *Todahl's* moribund form.

The situation in other circuits also is confused. Since *Marceau*, the Second Circuit has consistently denied liability for injuries to seamen en route to or from the ship. Most of the cases exhibit some factual

peculiarities such as the existence of wartime conditions, the existence of alternative routes of ingress and egress or the fact that the injury occurred beyond the pier. See *Wheeler* v. *West India SS Co.*, 103 F.Supp. 631 (S.D.N.Y. 1951), *aff'd. per curiam*, 205 F.2d 354 (2d Cir. 1953), *cert. denied*, 346 U.S. 889 (1953); *Dangovich* v. *Isthmian Lines, Inc.*, 327 F.2d 355 (2d Cir. 1964); *Farrell* v. *U.S.*, 167 F.2d 781 (2d Cir. 1948), *aff'd. re maintenance and cure*, 336 U.S. 511 (1949).

The First Circuit, in *Rodway* v. *Amoco Shipping Co.*, 491 F.2d 265 (1st Cir. 1974), upheld a directed verdict against the plaintiff, who was injured while voluntarily fighting a fire on a ship which was alongside his during the transfer of fuel. The decision recognized the applicability of *Shenker*, but found that it was not forseeable that the plaintiff would be on board the second vessel. Therefore there could be no duty to inspect, except "insofar as visible danger aboard the DEAN REINAUER might directly result in injury to those aboard the AMOCO." 491 F.2d at 167. That test, applied to this case, would sustain the verdict.

The Sixth Circuit has found liability in a case involving a seaman who went on to the dock to use a telephone and was injured when he slipped on ice about 150 feet from the gangway. *Chesapeake & Ohio Ry. Co.* v. *Newman*, 243 F.2d 804 (6th Cir. 1957). However, the dock was owned, maintained and controlled by the defendant. so *Newman* is an ambiguous authority within the context of this appeal. The Fifth Circuit has ruled in favor of a seaman injured while trying to board a launch, finding failure to provide a safe means of egress. *Massey* v. *Williams-McWilliams, supra;* it also has found Jones Act claims arising out of automobile accidents, *Magnolia Towing Co.* v. *Pace, supra; cf.*

Delancey v. *Motichek Towing Service, Inc.*, 427 F.2d 897 (5th Cir. 1970).

A dictum of this Court has lent respectability to the *Todahl* rule. In *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, 736-37 (1943), it was stated,

> "Consequently the fact that the shipowner might not be liable to the seaman in damages for the dock owner's negligence, cf. Todahl v. Sudden & Christenson (CCA 9th) 5 F(2d) 462, does not relieve him of his duty of maintenance and cure."

The District Court believed that "gave some support to the holding in *Todahl* . . . ." (App. 8a), even though this Court's decisions are contrary to the *Todahl-Paul* rule. In addition, it is the shipowner's negligence which is at issue here.

It is a matter of great importance that the confusion which is evident in the decisions of the lower courts be eliminated by a clear ruling by this Court that a seaman's right of recovery is not dependent upon the ownership, management or legal control of the dock. Any other result would deny to seamen "the cause of action—and consequently the judicially developed doctrine of liability—granted to railroad workers by the FELA." *Kernan*, 355 U.S. at 431.

5. *Seamen enjoy a special status.*

It is sufficient to apply the FELA standards of negligence to this case, but to the extent that there is any difference in rights between railroad workers and seamen, the law favors the latter.

> "We do not read the act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water. The

> conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This court has said that 'the ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly.' Robertson v. Baldwin, 165 U.S. 275, 287, 41 L. ed. 715, 719, 17 S. Ct. 326." *Cortes* v. *Baltimore Insular Line,* 287 U.S. at 377.

Thus, the *Carter* rule should apply with even greater force in a seaman's case.

In *Cortes,* the Court created a new remedy not expressly provided for in the FELA or the Jones Act and unknown to admiralty law. The court did the same in *Moragne* v. *States Marine Lines,* 398 U.S. 375 (1970). In the latter case, the Court commented on an earlier decision in language equally applicable to *Todahl,* that,

> "The latter decision, somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime law that it should no longer be followed." 298 U.S. at 378.

D.

The Decisions Below Invaded the Province of the Jury

1. *The jury has wide discretion in FELA cases.*

This Court has repeatedly held that in cases under the FELA or the Jones Act, the jury has a "preeminent role." *Ferguson* v. *Moore-McCormack Lines,* 352 U.S. 521, 513 (1957). In *Rogers* v. *Missouri Pacific R. Co.,* 352 U.S. 500, 507, 510 (1957), the court reviewed both the jury's function and the purpose of the FELA.

> "The law was enacted because the Congress was dissatisfied with the common law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying

damages for injury or death at work due in whole or in part to the employer's negligence.

* * *

"The decisions of this court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury."

Under the facts and instructions of this case, the jury could have found negligence of the shipowner in failing to provide a reasonably safe place to work, in failing to provide a reasonably safe means of ingress and egress, in failing to post any warning of the condition of the dock, which was known to the Captain in advance of the injury, or in the failure of the Captain, immediately prior to the accident, to warn petitioner of the hole into which he stepped. This is not a case, as many of the adverse decisions have involved, where the court ruled prior to a verdict or in the absence of any testimony with respect to the ship's duty. In this instance, there was expert testimony that the wharfage fee pays for, among other things, the right of ingress and egress, that a captain, knowing of holes in the dock, should notify the dock superintendent or agent and request that barricades be set up, that to do so would be the "customary practice," and that the dock in question was an unsafe place (Tr. 119-125).

In the light of the standards set forth in the cited cases, how can it be said, as the lower courts in effect have said, that no reasonable man can find that the employer's negligence contributed in any way to petitioner's injury?

2. *Even by common law standards, this was a jury case.*

The courts below and their authorities have held that there is no "duty" on the part of the ship to an employee on leave traversing the property of a third party. To say there is no duty is, of course, merely another way of saying that the plaintiff loses. There is nothing objective about the concept of duty, nor is there anything immutable about its dimensions. Negligence, which is the gravamen of any Jones Act claim, is nothing more than the failure to exercise reasonable care under the circumstances. That, by any standard, is a jury question. The concept of duty as a limitation upon liability for negligence is of legitimate significance only as a means of limiting the potential class of plaintiffs. It is a restriction, as a matter of policy, upon actions for negligence to protect potential defendants from claims by those with whom they have little or no connection and whose injuries occur in fortuitous and unexpected ways. Nothing in that concept has any relationship whatever to the present case. Here, we have a plaintiff who has a close and protected relationship to the defendant, injured in the course of his employment, in the company of the employer's chief officer, in a manner wholly forseeable from the nature of the hazard. The jury's determination of liability under those circumstances must be final, or the statutory grant of trial by jury is meaningless.

3. *Disputed facts were resolved against petitioner.*

On several points the courts below buttressed their opinions against recovery by resolving disputed issues of fact against the petitioner. Several examples follow.

In describing the circumstances of petitioner's injury, the District Court stated in its memorandum in support of judgment n.o.v.,

> "After he had traveled some 400 to 600 feet and while he was hurring to overtake several other seamen, including the captain, he stepped into a hole in the pier, thereby receiving the injuries for which he sought compensation in this court. At the time of the accident, the pier was owned, operated and controlled by the Chilean government."

The only testimony on the distance from the gangway to the place of the accident was by the Captain, who estimated the distance to be 450 feet (Tr. 105). While that of course falls within the brackets of 400 to 600 feet, the District Court's opinion seems a little slanted. That slant was exaggerated by the Court of Appeals, which found the distance to be 580 feet. That finding is in turn based upon nothing more than the respondent's brief, which misstates the evidence in asserting that figure. The courts below obviously were anxious to place the accident as far from the gangway as possible.

The preceding quote also indicates that the plaintiff was "hurring to overtake several other seamen . . . ." This, too, misstates the evidence. The Captain testified that petiitoner had left the ship shortly after the Captain and the purser and had been walking 10 or 15 feet behind them, that he increased his pace to come alongside the Captain because he wanted to talk to him, and during that conversation he stepped in the hole in the dock (Tr. 83, 97).

The District Court held, as indicated above, that the pier was "owned, operated and controlled by the Chilean government. However, the court had submitted the question of ownership to the jury as part of

Instruction 9 (Tr. 153-54). The question of control also was disputed and was submitted to the jury, at least by inference, in Instruction 9, which stated that the respondent "paid for the use of the dock in question and said dock was the only reasonable manner and way of ingress and egress . . . ."

Under proper instructions, the jury found respondent liable. The trial court should not be permitted to reverse that result by substituting its view of disputed facts.

E.

As a Matter of Policy, the Dock Should Not Be Excluded

If all of the prior authorities establishing a right of recovery on the property of a third party were to be ignored, and the matter were to be addressed as an original proposition, the shipowner's liability should be found to include the dock.

In a recent unseaworthiness case the Court was faced with the question of where to draw the line with respect to application of the seaman's remedy of unseaworthiness to longshoremen under the doctrine of *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946). Mr. Justice Douglas, in dissenting, stated that,

> "If a bright line test is desirable, then the Sieracki policy would be less offended by a bright line drawn around both the ship and the dock than by a line cast only about the vessel." *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202 at 224-25 (1971).

While a majority of the court decided otherwise for the longshoreman's case, Mr. Justice Douglas' test, if any is to be applied, is the appropriate one for purposes of a Jones Act claim. Compare the jurisdictional scope of the Longshoremen's and Harbor Workers' Act, as

amended in 1972 (which supersedes the basis of liability in *Victory*):

> ". . . The navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)." 33 U.S.C. § 903.

Thus the dock has been joined to the ship, not to the shore. The rationale behind such a position is clear. The seaman ordinarily has only one means of going ashore, which is to walk down the pier. Only when he reaches the shoreward end does he have a choice. Between that point and the ship his route is over an area selected, paid for, influenced and, to a considerable extent, occupied, by the ship.

A District Court case aptly described the situation as follows:

> "The obligations of the employer which I have mentioned extended beyond the point where he went ashore until he had actually and physically gotten away from the ship safely to such point as might be termed neutral territory." *Monteiro* v. *Paco Tankers, Inc.*, 92 F.Supp. 93 (E.D. Pa. 1950).

In view of the salutory policy of maximizing a seaman's protection, there would have to be a compelling reason to draw *any* line beyond which a Jones Act claim could not be maintained. Lines have been drawn in various cases for various reasons, some legitimate, some mistaken. None of them applies here. There is no question of jurisdiction as the *Todahl* court thought; after *O'Donnell* and *Hopson*, there can be no doubt that the jurisdiction of the U.S. District Court under the Jones Act reaches as far ashore as necessary. There is no conflict with state law, which appears to be the

determining factor in *Victory Carriers;* the seaman's rights are in no way affected by state law in general or workmen's compensation statutes in particular, although the *Todahl* court mistakenly thought so. There is no conflict with any other remedy, statutory or otherwise, and certainly no policy consideration which compels a restriction of the area of liability; everything in the history of seamen's rights calls for its maximum legitimate extension. Mr. Chief Justice Stone stated the principle as follows in *O'Donnell:*

> "There is nothing in the legislative history of the Jones Act to indicate that its words 'in the course of his employment' do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters. On the contrary it seems plain that in taking over the principles of recovery already established for railroad employees and extending them in the new admiralty setting . . . to any seaman injured 'in the course of his employment,' Congress, in the absence of any indication of a different purpose, must be taken to have intended to make them applicable so far as the words and the Constitution permit, and to have given to them the full support of all the constitutional power it possessed. Hence the Act allows the recovery sought unless the Constitution forbids it." 318 U.S. at 39.

VII.

CONCLUSION

This Court recently denied certiorari in an FELA case, two justices dissenting. *Hyatt* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 414 U.S. 926 (1973). The case apparently was not reported in the lower courts, but the summary of facts set out in the dissenting opinion shows that it is clearly distinguishable from the present case in that *Hyatt* involved an obvious and

constantly changing hazard (automobile traffic). The Court's denial of certiorari of course expresses no opinion on the merits of the case. However, as the dissenting opinion notes, the decision appealed from, as well as others discussed earlier in this petition, "limited the applicability of the FELA contrary to the purpose of Congress when it amended the Act to wipe out a host of judicially created defenses which had been engrafted on the Act."

Mr. Justice Frankfurter was frequently critical of the court's grant of certiorari in FELA and Jones Act cases. He seemed to think that the court was exercising more supervision than necessary over the lower courts' administration of those acts. However, in view of the repeated invasions of the province of the jury in previous cases, as well as in this one, it appears that Mr. Justice Frankfurter's view was too optimistic. He did, however, approve the grant of certiorari in *Kernan* in language which aptly describes the situation presented by this petition.

> "This is a case which involves a serious question of construction of a statute of nationwide importance. Such questions of construction are among the most important issues for final determination by this court." 355 U.S. at 441.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. 9623

THEODORE O. BATES, *Plaintiff*,

v.

PRUDENTIAL-GRACE LINES, INC., *Defendant*.

JUDGMENT

THIS MATTER having come on duly and regularly for trial before the Honorable William J. Lindberg, Judge of the above-entitled Court, sitting with a jury February 24, 1972, plaintiff appearing personally and through Thomas M. Geisness, one of his attorneys, and defendant not appearing, though represented by one of its attorneys, H. Graham Gaiser, and plaintiff and defendant having offered all of their evidence, and the Court having thereafter instructed the jury with regard to the issues, and after argument, the jury having retired to deliberate upon its verdict; and the jury having thereafter returned into Court with its verdict wherein it found in favor of the plaintiff in the sum of $85,500.00, and said verdict having been duly and regularly received and filed; and the Court being fully advised in the premises does now

ORDER, ADJUDGE AND DECREE that the plaintiff have and recover judgment of and from the defendant in the sum of $85,500.00, together with plaintiff's costs and disbursement with the Cost Bill attached hereto in the amount of $248.65.

DONE IN OPEN COURT this 16th day of March, 1972.

/s/ WILLIAM J. LINDBERG
United States District Judge

Presented by:

McCUTCHEON, GROSHONG, BETTIS, GEISNESS & DAY

By /s/ THOMAS M. GEISNESS
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. 9623

JUDGMENT

(Filed July 14, 1972)

This cause came on to be heard on defendant's motion to set aside the jury verdict and judgment for plaintiff, and to order judgment for defendant, and in the alternative for a new trial, and the court having considered the evidence and the arguments of counsel, and being fully advised, it is now

ORDERED, ADJUDGED and DECREED that the jury's verdict of February 24, 1972, in favor of plaintiff, and the judgment dated March 16, 1972, entered upon said verdict be, and hereby is, set aside and that judgment be, and hereby is, entered in favor of defendants, dismissing plaintiff's Complaint with prejudice and awarding defendants its taxable costs in the amount of $.

DONE in open court this 14th day of July, 1972.

/s/ WILLIAM J. LINDBERG
United States District Judge

Presented by:

BOGLE, GATES, DOBRIN, WAKEFIELD & LONG
By /s/ H. GRAHAM GAISER
Attorneys for Defendant

Form Approved:

McCUTCHEON, GROSHONG, BETTIS, GEISNESS & DAY
By
THOMAS M. GEISNESS
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. 9623

AMENDED JUDGMENT

(Filed August 1, 1972)

This cause came on to be heard on defendant's motion to set aside the jury verdict and judgment for plaintiff, and to order judgment for defendant, and in the alternative for a new trial, and the court having considered the evidence and the arguments of counsel, and being fully advised, it is now

ORDERED, ADJUDGED and DECREED that the jury's verdict of February 24, 1972, in favor of plaintiff, and the judgment dated March 16, 1972, entered upon said verdict be, and hereby is, set aside and that judgment be, and hereby is, entered in favor of defendant, dismissing plaintiff's Complaint with prejudice and awarding defendant its taxable costs in the amount of $387.30 and denying motion for new trial.

DONE IN OPEN COURT this 1st day of August, 1972.

/s/ WILLIAM J. LINDBERG
United States District Judge

Presented by:

McCUTCHEON, GROSHONG, BETTIS, GEISNESS & DAY
By /s/ THOMAS M. GEISNESS
Attorneys for Plaintiff

Form Approved:

BOGLE, GATES, DOBRIN, WAKEFIELD & LONG
By /s/ H. GRAHAM GAISER
Attorneys for Defendant

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Civil No. 9623

MEMORANDUM OPINION SUPPORTING THE COURT'S AMENDED JUDGMENT OF AUGUST 1, 1972

(Filed August 17, 1972)

On August 1, 1972 this Court entered the following amended judgment in the above entitled matter:

> This cause came on to be heard on defendant's motion to set aside the jury verdict and judgment for plaintiff, and to order judgment for defendant, and in the alternative for a new trial, and the court having considered the evidence and the arguments of counsel and being fully advised, it is now
>
> ORDERED, ADJUDGED and DECREED that the jury's verdict of February 24, 1972, in favor of plaintiff, and the judgment dated March 16, 1972, entered upon said verdict be, and hereby is, set aside and that judgment be, and hereby is, entered in favor of defendant, dismissing plaintiff's Complaint with prejudice and awarding defendant its taxable costs in the amount of $387.30 and denying motion for new trial.

The following memorandum opinion briefly outlines the pertinent facts, which I believe are undisputed, and sets forth the reasons for the entry of the amended judgment granting defendant's motion for judgment notwithstanding the verdict.

The jury in this admiralty case returned a verdict of $85,500 for personal injuries suffered by plaintiff while employed as a seaman in the service of defendant's vessel, the SS SANTA REGINA. The accident giving rise to the suit occurred on August 8, 1970, while the vessel was moored to a pier in the Port of Antofagasta, Chile. Plaintiff left the vessel during daylight on that date and proceeded across the pier with the intention of going into town on a personal errand. After he had traveled some 400 to 600

feet and while he was hurrying to overtake several other seamen, including the captain, he stepped into a hole in the pier, thereby receiving the injuries for which he sought compensation in this Court. At the time of the accident, the pier was owned, operated and controlled by the Chilean government.

Defendant has moved for judgment notwithstanding the verdict and in the alternative for a new trial.

Plaintiff's claim originally was predicated on both negligence and unseaworthiness. The Court, however, submitted the case to the jury only on the basis of the alleged negligence under the Jones Act [1] and, more specifically, on the alleged failure of defendant to exercise reasonable care to provide plaintiff with a reasonably safe place to work.[2] Though the jury was not so instructed, such a duty in this case, where defendant had no control over the pier, could require at most inspection of the pier and a warning to the crew. Defendant's principal assertion in support of its motion for judgment is that this duty does not extend to a seaman while he is beyond the gangway for personal reasons and in an area neither owned nor controlled by the vessel owner.

The question presented is not one of first impression in this Circuit. As defendant points out, the Ninth Circuit held in *Todahl* v. *Sudden & Christenson*, 5 F.2d 462 (9th Cir. 1925), that similar factual allegations were insufficient to withstand a demurrer by the owners of the vessel. In that case, the seaman alleged that he was returning to his ship at night after having made a trip into town for personal reasons when he fell into a space between the wharf

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[1] 46 U.S.C. § 688.

[2] See *West* v. *United States*, 361 U.S. 118 (1959), where the Court states, ". . . one aspect of the shipowner's duty to refrain from negligent conduct is embodied in his duty to exercise reasonable care to furnish a safe place to work."

and bumpers which protected the wharf from the ships. The wharf was neither owned nor controlled by the owners of the vessel. The sustaining of the demurrer was upheld on two grounds: first, admiralty jurisdiction under the Jones Act did not extend to torts committed on land;[3] and second, the substantive duty of a vessel owner to provide a seaman with a safe place to work did not "extend to his protection when going beyond the premises of his employment for purposes of his own and over premises of which his employers had no dominion or control." *Todahl* at 464.

The first ground relied upon by the *Todahl* court was an expression of the old locality rule which clearly has been vitiated by the Extension of Admiralty Jurisdiction Act of 1948. This Act broadened the admiralty jurisdiction to include injuries "caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."[4] There is no indication, however, that the Act had any effect on the second ground relied upon in *Todahl*, other than the obvious one of giving the admiralty court the power to adjudicate a cause of action which arises from the alleged breach of a substantive duty which itself extends beyond the gangway. Therefore, unless the precedent established by *Todahl* has been abrogated by subsequent cases, defendant's motion for judgment notwithstanding the verdict must be granted.

The Ninth Circuit has given no indication whether it would follow *Todahl* today. Other circuits which have addressed the same issue, however, have followed *Todahl* without exception. In *Paul* v. *United States*, 205 F.2d 38

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[3] The Court implicitly assumed that a pier is an extension of the land for jurisdictional purposes. This assumption was expressly affirmed in *Swanson* v. *Marra Bros., Inc.*, 328 U.S. 1 (1946), and *T. Smith & Sons, Inc.* v. *Taylor*, 276 U.S. 179 (1928).

[4] 46 U.S.C. § 740; Cf. *Gebhard* v. *SS Hawaiian Legislator*, 425 F.2d 1303, 1306 (9th Cir. 1970).

(3d Cir. 1953), cert. denied, 346 U.S. 888, the Third Circuit posed the question "whether there was a duty on the part of the shipowner to inspect the dock area owned and controlled by a third party before granting shore leave to crew members and to give warning of any hazards." *Paul*, at p. 41. It analogized the question to that arising in nonmaritime master-servant law where an employer sends his employee onto the property of a third person to perform work. Finding no duty of inspection in such nonmaritime situations, the Court found none where a seaman voluntarily leaves his vessel on shore leave and is subsequently injured by some defect in the dock. This conclusion was reaffirmed in *Hagans* v. *Ellerman & Bucknall Steamship Company*, 318 F.2d 563, 579 (3d Cir. 1963).

The Second Circuit also has followed the general rule of *Todahl*. In *Wheeler* v. *West India SS Co.*, 205 F.2d 354 (2d Cir. 1953), the Court of Appeals in a per curiam opinion adopted the opinion of the District Court for the Southern District of New York which noted:

> Though the defendant was duty-bound to provide reasonably safe means of immediate access to the vessel (citing authority), shipowners have generally been held not liable for unsafe conditions in places beyond the gangway not under their control when the seaman is there for his own purposes and not in the performance of his duties.[5]

The Southern District of New York again cited *Todahl* favorably in both *Dangovich* v. *Isthmian Lines, Inc.*, 218 F. Supp. 235, 237 (S.D.N.Y. 1963), aff'd 327 F.2d 355 (2d Cir. 1964), and *D'Costa* v. *United States Lines Company*, 227 F. Supp. 180 (S.D.N.Y. 1964). Both cases are factually distinguishable but do support the continued validity of *Todahl*.

District courts in the Fourth and Fifth Circuits have cited *Todahl* and denied recovery for seamen under even more compelling circumstances than are present in the case

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[5] 103 F. Supp. 631, 634 (S.D.N.Y. 1951).

now before this Court. In both *Lemon* v. *United States*, 68 F. Supp. 793 (D. Md. 1946), and *Miles* v. *States Marine Lines, Inc.*, 325 F. Supp. 1370 (E.D. Tex. 1971), seamen were killed while attempting to return by small boat to their ships which were anchored off shore. The court found that the shipowners had no duty to provide a means of transportation between ship and shore for seamen granted shore leave. It followed that the shipowners were not liable for any negligent injury to seamen who arranged their own transportation.[6]

The plaintiff has cited one recent district court case from the Third Circuit, *Hamilton* v. *Marine Carriers Corp.*, 332 F. Supp. 223 (E.D. Pa. 1971)[7] which departs from the rule

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[6] The Supreme Court also gave some support to the holding in *Todahl* in *Aguilar* v. *Standard Oil Co. of New Jersey*, 318 U.S. 724, 736, 737, (1943), when it stated:

> Consequently, the fact that the shipowner might not be liable to the seamen in damages for the dockowner's negligence, cf. *Todahl* v. *Sudden & Christenson*, 5 F.2d 462 (C.C.A.), does not relieve him of his duty of maintenance and cure.

[7] The plaintiff in that case alleged that he stepped into an ice covered hole in a pier, which appeared to him to be solid, several hundred feet from the gangway of his ship while returning from a personal excursion into town. The court denied defendant's motion for summary judgment and in doing so accepted plaintiff's version of the facts as an accurate reflection of events surrounding the accident. The court found that plaintiff's allegations stated a claim and offered two bases for its conclusion. First, it found that the owner of the pier conceivably was an agent of the shipowner. Second, it found that the duty of a shipowner to provide a seaman a safe place to work extends to the pier even when the seaman is there for his own purposes and the shipowner has no control over the premises.

The district judge in his opinion first reviewed most of the cases cited earlier in this opinion and recognized the rule which they followed. He then went on to examine briefly two FELA cases, *Carter* v. *Union Railroad Company*, 438 F.2d 208 (3d Cir. 1971), and *Shenker* v. *Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), and to conclude that these cases impliedly had overruled the *Todahl* rule as adopted in the Third Circuit by *Paul*.

announced in *Todahl* as followed by the Court of Appeals for the Third Circuit in cases cited earlier in this opinion. However, until such time as the Court of Appeals for this Circuit modifies the *Todahl* rule, should it do so, this court believes it applicable and controlling under the facts as established by the record in this case. Judgment for defendant as entered on August 1, 1972 is in accord with said rule.

The Court denied defendant's alternative motion for new trial primarily because of the Court's firm conviction that under the *Todahl* rule the motion for a directed verdict should have been granted.

In the event the Court of Appeals should modify the *Todahl* rule and set aside the Court's judgment of August 1, 1972 defendant's alternative motion for a new trial should, I believe, have further consideration either by the Court of Appeals or by the district court upon remand.

DATED this 17th day of August, 1972.

/s/ WILLIAM J. LINDBERG
United States District Judge

Although I recognize that this conclusion has some merit I cannot give it great weight. First, I cannot conclude that either *Carter* or *Shenker* was intended to abrogate such a well established rule. Second, the case may be distinguished from the situation presented here in that in *Hamilton* the district court denied defendant's motion for *summary judgment* and in doing so stated:

> Since the jury must decide (1) whether defendant used reasonable care to furnish a safe means of ingress and egress in this case and (2) whether the defendant used reasonable care to inspect the pier and correct or warn of any possible dangers, summary judgment for the Jones Act claim based on defendant's negligence also must be denied.

Denial of a defendant's motion for summary judgment before trial presents a substantially different situation than a motion notwithstanding the verdict after all the evidence has been submitted to and considered by the jury. Third, the ice covered hole that *Hamilton* fell into presented a hidden trap whereas in the present case the hole was clearly visible to anyone who was observing the path he was walking.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

May 2, 1974

To All Counsel:

Re: Nos. 72-2659 & 72-2689, Theodore O. Bates v. Prudential-Grace Lines, Inc.

Gentlemen:

Pursuant to the provisions of this court's Rule 3(a), your case has been classified as one in which the questions raised on appeal are, in the unanimous opinion of a panel of the court, of such a nature that oral argument would not be of assistance to the court.

The case is now deemed submitted for decision to:

Judges Ely, Merrill and Goodwin.

You may, if you wish, serve and file in quadruplicate within ten days a supplement to your brief, listing new court decisions or cases which you previously overlooked, or call attention to new factual developments which may possibly moot the appeal, call for substitution of parties, or alert the court to other pending appeals involving the same issues.

Very truly yours,

Clerk of Court

By:

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 72-2659, 72-2689

THEODORE O. BATES, *Appellant; Cross-Appellee,*

v.

PRUDENTIAL-GRACE LINES, INC., *Appellee; Cross-Appellant.*

OPINION

[May 17, 1974]

Appeal from the United States District Court
for the Western District of Washington
Northern Divison

Before: MERRILL, ELY, and GOODWIN, Circuit Judges.

PER CURIAM:

Bates was employed as a deck department seaman on the SS SANTA REGINA, a merchant vessel owned and operated by Prudential-Grace Lines, Inc. While the vessel was moored at a port in Chile, Bates took shore leave, and, as he was walking along the pier at which the vessel was docked, he stepped into a hole in the pier and suffered injuries. The hole was located about 580 feet from the vessel's gangway. Bates instituted suit against his employer under the provisions of the Jones Act, 46 U.S.C. § 688. In a jury trial, the jury resolved the issue of liability in favor of Bates and fixed his damages at $90,000. This sum was reduced to $85,500 pursuant to the jury's finding that Bates was contributively negligent to the exten of five percent. Subsequently, the district judge, Honorable William J. Lindberg, granted the shipowner's motion for a judgment notwithstanding the verdict. Bates has appealed to this court, and the shipowner has filed a cross-appeal.

In support of his Order entering judgment for the shipowner notwithstanding the jury's verdict, Judge Lindberg prepared and filed a carefully researched opinion, reported at — F. Supp. — (D.C. Wash. 1972). Believing that Judge Lindberg correctly analyzed and resolved the issue of liability, we adopt his opinion as our own.[1]

The judgment challenged by Bates is affirmed, and the shipowner's cross-appeal is dismissed as moot.

So Ordered.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 72-2659 & 72-2689
DC # 9623

JUDGMENT

(Filed May 17, 1974)

Appeal from the United States District Court for the Western District of Washington (Seattle).

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said Dis-

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[1] We do not, however, necessarily approve or disapprove the reasoning of all the District Court opinions cited by Judge Lindberg.

Bates relies heavily upon *Hamilton* v. *Marine Carriers Corp.*, 332 F. Supp. 223 (E.D. Pa. 1971). Insofar as the District Court's opinion in that case may be relevant to the facts and liability issue here presented, we expressly disapprove and reject the *Hamilton* reasoning.

trict Court in this Cause be, and hereby is affirmed, and the shipowner's cross-appeal is dismissed as moot.

A TRUE COPY

ATTEST June 26, 1974

EMIL E. MELFI, JR.,
Chief Deputy and Acting Clerk

By /s/ F. MANCINI
F. Mancini
Deputy Clerk

Filed and entered May 17, 1974

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 72-2659 & 72-2689

ORDER

(Filed June 17, 1974)

On Petition for Rehearing

Before: MERRILL, ELY, and GOODWIN, Circuit Judges.

The Petition for Rehearing is denied.

WALTER ELY
United States Circuit Judge

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IN THE

Supreme Court of the United States

October Term 1974

No. 74-286

THEODORE O. BATES, *Petitioner*,

v.

PRUDENTIAL-GRACE LINES, INC., *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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October Term 1974

No. 74-286

THEODORE O. BATES, *Petitioner*,

v.

PRUDENTIAL-GRACE LINES, INC., *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

QUESTIONS PRESENTED

A.

Is a seaman, leaving his ship on shore leave, precluded as a matter of law from recovering damages under the Jones Act for injuries sustained in a fall in a hole on the dock not owned or legally "controlled" by the shipowner, when the place of injury is not in the immediate vicinity of the gangway?

B.

Is a seaman, under the Jones Act, afforded equal rights of recovery to those granted to a railroad worker under the FELA; or is the FELA, when applied to seamen, to be interpreted in light of the basic differences in working conditions of the two occupations?

C.

Was the plaintiff wrongfully deprived of his right to a jury trial by the judgment N.O.V. entered by the lower court, based upon a conclusion that the shipowner had no duty to the plaintiff who was on shore leave and was injured 580 feet from the ship's gangway on premises over which the shipowner had no dominion or control?

II.

SUPPLEMENTAL STATEMENT OF THE CASE

While petitioner has, in most respects, fairly stated the case, the following additional facts should be brought to the court's attention in order to place this case, and its issues, in proper perspective.

The pier in question was neither owned, operated, maintained nor controlled by the shipowner or its agents. (R. at 5-6; R. at 19, ll. 16-18; R. at 148, ll. 20-22.) Rather, the pier was owned, operated, maintained and controlled by Empressa Portuaria de Chile, an entity of the Government of Chile. (R. at 148, ll. 21-22; Tr. 99, ll. 5-9.)

Petitioner's purpose in being upon the pier on the occasion of his injury was for purely personal reasons and not in the performance of his work as a seaman (Tr. 52 ll. 10-25; Tr. 100, l. 22; Tr. 101, l.5). Petitioner, who has been a merchant seaman since 1945 (Tr. 2, ll. 9-17), intended "to go up town and see how other people live." (Tr. 52, ll. 13-14.) In summary, petitioner was on shore leave, not on ship's business. There is no *requirement*, statutory or otherwise, that shore leave be granted to the crew. To the contrary, as evidenced by the testimony of petitioner's expert

witness, the granting of shore leave is discretionary (Tr. 120, ll. 1-10; Tr. 126, ll. 17-21).

The hole into which petitioner stepped was not in the immediate area of the gangway. The hole was located by petitioner some 580 feet from the end of the vessel's gangway. (The gangway was located amidships of a vessel roughly 525 feet long [Tr. 104, ll. 12-23]. From the stern of the vessel east to the end of the pier was approximately 300 feet [Tr. 59, ll. 5-8; Tr. 60, ll. 4-9] The hole was approximately twenty feet beyond the furthermost edge of the pier [Tr. 21 ll. 21-22].) The vessel's master placed the hole somewhat closer, about 450 feet from the gangway (Tr. 105, ll. 5-12).

The pier area from the gangway to the main gate was not a narrow path which one must necessarily traverse. Rather, the area was amply wide so that one could choose his own route almost without limitation. The vessel was docked parallel to the face of the pier in a generally east-west direction, the bow heading west (Tr. 72, ll. 12-13). The gate was east. Warehouses paralleling the face of the pier were 40 to 50 feet to the south. (Tr. 72, l. 22; Tr. 73, l. 10; Tr. 19, l. 25; Tr. 21, l. 2), although in this area there were railroad tracks about 12 feet south of, and parallel to, the face of the pier. However, the accident itself occurred further east, about 20 feet from the edge (not the face) of the pier. In this area where the injury occurred, the available "path" to the gate was about 1000 feet wide (Tr. 49, ll. 1-8; Tr. 96, l. 14; Tr. 97, l. 5).

The hole itself was not concealed but was, in fact, open and obvious to even the most casual observer. The hole was about 18 inches in diameter (Tr. 22, ll. 3-5; Tr. 87 ll. 2-3).

As previously described, the hole was located in an open rather than a confined area. It was daylight at the time of the injury and visibility was no problem (Tr. 48, ll. 3-9; Tr. 83, ll. 1-2). The vessel's master had seen the hole from some 15 to 20 feet away (Tr. 100, ll. 10-18). Petitioner himself was aware prior to the accident that there were other holes on the pier (Tr. 19, ll. 13-24).

III.
ARGUMENT

A.
Traditional Grounds for Granting Certiorari Are Not Present

1. A well established ground for granting a writ of certiorari is the existence of a conflict between the decision as to which review is sought and that rendered by the Supreme Court or some lower court whose judgment is final in the absence of Supreme Court review. It has been stated generally that certiorari will usually be granted when there is a conflict between courts of appeals on the same matter of *federal* or *general* law, the obvious purpose being to secure uniformity between the various courts.

A careful reading of the petitioner's brief fails to reveal the presentation of any conflicts between courts of appeal on the precise factual situation existing in this case. The many citations of FELA cases are inapposite, since service aboard a vessel and necessary work done in its environs can in no way be analogized to the duties of a railroad worker, particularly in fulfilling his many functions required in and about the employer's premises when not actually aboard a train.

The petitioner actually admits the absence of a conflict between circuits as follows:

> "Despite the obvious infirmities of Todahl, it has been followed in other circuits." (Petitioner's Brief p. 21)

The *Todahl* case to which he refers is that upon which the appellate court based its ruling and will be more fully discussed below.

2. Similarly, the *importance* of the issue involved has been said to be of major significance in determining whether the writ will issue. Importance is a relative matter, but in this concept it has been held to mean importance "to the public as distinguished from" importance to the "parties" involved. *Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393.

The respondent would agree that it possibly could have breached a duty to seaman Bates if the hole in the dock had been "in the immediate vicinity" of the gangplank, to employ an expression used in the many cases cited below. But the hole into which Bates fell was 580 feet from the gangway. The "importance" of the case cannot justifiably be based on the distance differential between the "immediate vicinity of the plank" and the point of injury 580 feet from the plank. Certiorari was not intended to, nor has it been used to, grant review of such a miniscule factual variation.

B.

The Petitioner's Cause of Action Is Derived From FELA But He Is in *Maritime* Employment

Petitioner has urged that the shipowner is required to furnish a safe place to work on premises over which the

shipowner has no control because (1) recent railroad (FELA) cases so hold, and (2) seamen and railroad employees have "identical" rights. This argument fails to consider the fundamental fact that the very nature of a railroad worker's employment precludes equation with a seaman on shore leave. The circumstances of employment are simply not comparable. As succinctly stated in *Vickers v. Tumey*, 290 F.2d 426, 429-30 (5th Cir. 1961):

> "Of course with a statute transplanted from the switchyard to navigable waters, it would be doctrinaire to suggest that incorporation of FELA by the Jones Act necessarily brought along identical standards and application. It would be clearly wrong because it would ignore the essential differences in conditions and circumstances of employment. . . ."

The very argument which petitioner has advanced on this point was expressly rejected in the recent case of *Dixon v. Grace Lines, Inc.*, 27 Cal. App. 3d 278, 103 Cal. Rptr. 595, 602 (1972):

> "Plaintiff contends defendant was under a duty to provide him with a safe place in which to work, including safe means of ingress and egress to and from the vessel. In support of this contention he cites cases which hold that under the Federal Employer's Liability Act a railroad has the nondelegable duty to provide its employees with a safe place in which to work even when they are required to go onto the premises of a third party over which the railroad has no control. [Citations.] It is true that the Jones Act incorporates the standards of the Federal Employers' Liability Act in determining the employer's liability for injuries negligently inflicted on its employees. [Citation.] However, because of the essential differences between the conditions and circumstances of employment in the railroad industry and the maritime shipping industry, such incorporation did not necessarily bring along identical standards and application of the Federal Employers' Liability Act in Jones Act cases. . . ."

C.

A Shipowner Has No Duty to Protect a Seaman on Shore Leave From Hazards Beyond the Immediate Area of the Gangway on Premises Over Which the Shipowner Has No Control

Petitioner bases his cause of action on the Jones Act (46 U.S.C. ¶688) which, through its incorporation of the Federal Employers Liability Act (45 U.S.C. ¶51), allows a seaman to sue his shipowner/employer for *negligence*.

It is axiomatic that in order for a defendant to be liable for negligence, a duty *which the defendant* owes to plaintiff must be breached:

> "The essential elements of actionable negligence include the existence of a duty *on the part of the defendant* to protect the plaintiff from injury, failure of the defendant to perform that duty, and injury to the plaintiff resulting from such failure." [Emphasis supplied] 65 C.J.S. *Negligence*, §2(1), p. 464 (1966).

These principles are also applicable to the Jones Act:

> ". . . [The Jones Act] does not make that negligence which was not negligence before, does not make the employer responsible for acts or things *which do not constitute a breach of duty.*" *DeZon v. American President Lines, Ltd.*, 129 F.2d 404, 407-08 (9th Cir. 1942) (emphasis added), *aff'd.* 318 U.S. 660 (1943).

It is obvious from the foregoing that the first question presented in this appeal is whether a shipowner has any duty at all to protect a crew member on shore leave from hazards beyond the immediate area of the gangway on premises over which the shipowner has no control.

This precise question was earlier presented to the court below in *Todahl v. Sudden & Christenson*, 5 F.2d 462 (9th Cir. 1925).

In *Todahl*, plaintiff crew member sustained injury when he stepped into a hole on an unlighted wharf. He brought suit against his employer and against the owner of the wharf for damages, alleging negligence in that defendants had failed to advise him of the unsafe condition of the pier. Even though the vessel was operating under charter or contract with the pier owner, the court sustained the shipowner's demurrer to plaintiff's allegations. In the course of its opinion, the court set forth the limitations on the duties owed a seaman on shore leave under facts analogous to those of the case at bar:

> ". . . The complaint shows that at 5 o'clock in the afternoon the plaintiff obtained permission to go ashore on business of his own, that he went ashore over the wharf whereby he must have had opportunity to observe its construction, and that at midnight he was returning over the wharf on his way to the ship when the accident occurred. It is argued that the plaintiff was injured while in his employer's service, inasmuch as he was under obligation to return to the vessel and was required to pass over the wharf. It is true, as we held in *Lamphere v. Oregon Nav. Co.*, 196 F.336, 116 C.C.A. 156, 47 L.R.A. (N.S.) 1, than an employee is in the service of his master whenever he is doing that which under his contract of employment he is bound to do. But here the plaintiff, in voluntarily going ashore, and thus by his own act making his return necessary, was not doing that which his contract of employment bound him to do. The owners of the steamship owed him the duty of providing a safe place in which to perform his work as a seaman. *That duty did not extend to his protection when going beyond the premises of his employment for the purpose of his own and over premises of which his employer had no dominion or control. . . .*" 5 F.2d at 464 (emphasis added).

In the instant case, the trial court relied upon *Todahl* in granting defeandant's motion for Judgment Notwithstand-

ing the Verdict. (Memorandum Opinion, R. 220-226). Reliance by the trial court on *Todahl* as binding precedent is well-founded, as evidenced by the unanimous adoption of the *Todahl* principle by other circuit courts which have considered the issues presented in this appeal.

The Second Circuit first considered the question in *Wheeler v. West India S.S. Co.*, 103 F. Supp. 631 (S.D.N.Y. 1951), *aff'd. per curiam*, 205 F.2d 354 (2d Cir. 1953), *cert. denied*, 346 U.S. 889 (1953). In *Wheeler*, the plaintiff was an engineer aboard defendant's vessel which was docked at the end of a viaduct extending about one mile into the sea at a port in France. During daylight plaintiff went ashore on shore leave by means of the viaduct, which was in a state of disrepair as a result of wartime bombing. Later that night, plaintiff was returning to his vessel on the viaduct, which was unlighted. He was struck by a train which was apparently being operated in a negligent manner. The district court, setting aside a jury verdict in favor of plaintiff in an opinion adopted by the appellate court, stated:

> "Though the defendant was duty-bound to provide reasonably safe means of immediate access to the vessel [citations], shipowners have generally been held not liable for unsafe conditions in places beyond the gangway not under their control when the seaman is there for his own purposes and not in the performance of his duties [citations]." 103 F.Supp. at 634.

The issue was again raised in *Dangovich v. Isthmian Lines, Inc.*, 218 F. Supp. 235 (S.D.N.Y. 1963), *aff'd.*, 327 F.2d 355 (2d Cir. 1964). The court dismissed plaintiff's action, brought under general maritime law and the Jones Act, for injuries sustained when he fell from a narrow, unguarded railroad trestle while returning to the vessel

from shore leave in an Iranian port. The court concluded that the defendant shipowner had no duty to provide plaintiff while on shore leave with a safe means of egress or access to the vessel beyond the gangway, and that the defendant had no duty to warn seamen of dangers existing beyond the gangway. In granting judgment to the defendant, the court noted:

> "Subsequent cases have reaffirmed the rule that there is no duty on the shipowner to provide safe means of access or egress (beyond the gangway) to seamen on shore leave. . . ." 218 F. Supp. at 237.

The issue was again raised in *D'Costa v. United States Lines Co.*, 225 F. Supp. 180 (S.D.N.Y. 1964), wherein a crew member sustained injury when he slipped while descending stairs between a street and a pier in Spain. Plaintiff, returning to the vessel from shore leave, claimed that the stairs, which were located several hundred yards from the dock area, had no handrails and inadequate lighting. The court granted the shipowner's motion for summary judgment both as to unseaworthiness and negligence:

> ". . . The law is clear that a ship owner is not under a duty to warn crew members who are going ashore for their own pleasure of the existence of possible dangerous conditions in a shore area beyond the ship's control. [Citations]" 225 F. Supp. at 181.

The Court of Appeals for the Third Circuit considered the issue in *Paul v. United States*, 205 F.2d 38 (3d Cir.), *cert. denied*, 346 U.S. 888 (1953). The plaintiff seaman in *Paul* sustained injury in Italy when he stepped into a recess on a narrow, unlighted, unguarded area with no railings located on the pier about 100 feet beyond the bow of the vessel. The court posed as the issue the following question:

> "Other than in the immediate vicinity of the vessel's

> gangplank, is a shipowner under a duty to provide safe means of passage from or to the vessel over a dock area over which the shipowner has no control and/or to inspect and give warning to the conditions prevailing along the dock's passageway?" 205 F.2d at 38.

The court answered the question in the negative, concluding that no such duties existed.

The court in *Paul* also explicitly rejected the plaintiff's argument (also advanced by petitioner herein) that "the duty to provide a safe means of ingress to, and egress from, the vessel is part and parcel of the traditional duty on the part of a vessel to provide its seamen with a safe place in which to work."

Apparently, no other circuit court has explicitly ruled on the question presented in this appeal. A somewhat analogous situation was presented to a district court in the Fourth Circuit in *Lemon v. United States*, 68 F. Supp. 793 (D.Md. 1946), involving a seaman who was asphyxiated by carbon monoxide which had accumulated in the cabin of a launch returning the seaman to his vessel from shore leave. The court denied recovery, holding that the shipowner had no duty to provide crew members with safe transportation to and from the vessel.

Likewise in a case arising in a district court in the Fifth Circuit, *Miles v. United Marine Lines, Inc.*, 325 F. Supp. 1370 (E.D. Tex. 1971), the court concluded that the shipowner owed no duty to provide crew members with safe means of transportation from the vessel to shore and back. The court also concluded that the shipowner's duty to provide a safe place to work does not extend beyond the ship where shore leave is concerned.

Another case arising out of a district court in the Fifth Circuit is in point, *Martinez v. SS "Hawaiian Retailer"*, 1963 A.M.C. 1188 (S.D. Ga. 1963). In *Martinez*, a crew member was injured while leaving the pier area on shore leave. To reach the street, it was necessary for him to cross the pier, proceed through a warehouse on the pier and descend a short ladder from the warehouse to the street. The crew member fell while descending the defective and poorly lighted ladder which was located some 350 to 400 feet from the ship's gangway. Defendant shipowner did not own or operate the pier but had used the pier in question on many previous occasions. The ship had been at the pier for nearly two days before the crew member was injured, and the crew member had never been on the pier before. Even in this posture, however, the shipowner's motion for summary judgment was granted. The court specifically rejected the crew member's claims that the shipowner was negligent in failing to inspect the dock, in failing to provide the crew member with a safe place to disembark, and in providing no other means of egress other than through the warehouse, which had poor lighting, no exit markings, and defective ladders. The court agreed with the shipowner's contentions:

> "1. The shipowner's duty to provide safe egress from the ship for members of the crew is limited to egress from the ship to the dock and does not extend beyond the area in the immediate vicinity of the ship's gangway.
>
> "2. There is no duty imposed by law upon a vessel or its owner to inspect a dock or warehouse area owned and operated by a third party before granting shore leave to crew members and to warn them of any hazards, even when this area must be traversed by the crew in order to get from the ship to the nearest street." 1963 A.M.C. at 1190.

The precise question presented in this appeal has not been directly ruled upon by the United States Supreme Court. This court has, however, cited the Ninth Circuit's *Todahl* case with approval in *Aquilar v. Standard Oil Co.*, 318 U.S. 724, 736-37 (1943), which held that maintenance and cure is available to a crew member injured on shore leave:

> "... Consequently the fact that the shipowner might not be liable to the seaman in damages for the dock owner's negligence, *cf. Todahl v. Sudden & Christenson* (CCA 9th) 5 F(2d) 462, does not relieve him of his duty of maintenance and cure...."

The cases discussed above are illustrative of the wide acceptance of the long-established principles announced by this court in the *Todahl* decision. It is the well-established rule of law that under the facts and circumstances of the instant case: (1) respondent owed no duty to provide petitioner with safe egress beyond the immediate area of the gangway, (2) respondent owed no duty to inspect the pier for the presence of potentially dangerous conditions, (3) respondent owed no duty to warn petitioner of dangerous conditions on the pier, and (4) respondent owed petitioner no duty to provide a reasonably safe place to work. There being no duty on the part of respondent with respect to petitioner's allegations of negligence, there can be no actionable negligence for which respondent can be held liable to petitioner. No duty *which respondent owed to petitioner* was breached. This should end the matter, and the trial court's judgment in favor of respondent should be affirmed.

D.

The Trial Judge and Jury Have Their Respective Functions in Our System of Jurisprudence

No citation of authority is needed to assist in a reflection of the roles played by the judge and jury in a personal injury action such as the one at bar.

Since the action is based on negligence, the trial judge must define for the jury the duties which exist between the parties, the breach of which will constitute such negligence. It is for the *jury,* with such guidlines, to determine, from a review of all of the conflicting evidence, whether such a breach has occurred.

If the judge, from a review of the applicable decisions, determines that a duty did not exist, he can, as a matter of law, and either before or after a full trial, rule for the defendant. In the case at bar this was done after the trial by the entry of a judgment N.O.V.

This action did *not* invade the province of the jurors. There was simply no cause of action which could be properly presented to them.

IV.

CONCLUSION

Respondent suggests that the petitioner has misconceived the function of a petition for certiorari. It is not a forum for the re-argument of the case on the merits, but rather presents the means to convince this court that traditional grounds exist for the granting of the writ.

A conflict of decisions in the various circuits has *not*

been shown. The *importance* of the issues (except as between the individual parties) has *not* been demonstrated.

As stated in *Magnum Co. v. Coty*, 262 U.S. 159, 163:

> "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

It is respectfully submitted that the petition be denied.

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